No. (2)

Supreme Court, U.S.
FILED

04-771 DEC 2 - 2004

OFFICE OF THE CLERK

In The Supreme Court of the United States

JASON L. DIEDRICH,

Petitioner,

v.

CITY OF NEWPORT NEWS, VIRGINIA; EDGAR E. MARONEY, individually and as City Manager of the City of Newport News; DENNIS A. MOOK, individually and as Chief of Police, Newport News Police Department,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The petitioner, a sworn law-enforcement officer with the City of Newport News, Virginia, was terminated from his employment in 1995 for alleged perjury and larceny charges. Following two separate jury acquittals, the petitioner was found not guilty on both counts. In a subsequent grievance procedure, the charges were determined to be unfounded. The petitioner was cleared of the charges and ordered reinstated. Using the above charges as the sole basis for their decision, the respondents have stripped the petitioner of all law-enforcement authority and demoted him to a position of IBR Quality Control in the Records Division. This demotion includes the denial of tangible city benefits.

Question-1: Is it implicit in the due process rights under the Fourteenth Amendment that the legally binding ruling of a grievance panel continue to be carried out and obeyed?

2. Following the demotion to the records division, and the removal of his law-enforcement authority the petitioner experienced extreme emotional distress, embarrassment, humiliation and financial hardship. The respondents ordered petitioner to undergo a fitness for duty evaluation. Respondents subsequently suspended petitioner, without pay, for a three month period. The petitioner was denied any due process opportunity to refute this unpaid suspension.

Question-2: Does an employee with a valid property interest in his continued public employment have a right to a hearing prior to being deprived of his wages by an ordered unpaid suspension?

3. The respondents claim under *Brady v. Maryland*, 373 U.S. 83 (1963) , and *Giglio v. United States*, 405 U.S. 150 (1972), that the petitioner no longer meets the requirements as a law-enforcement officer due to a supposed "Brady" issue of credibility. Their actions are in total disregard of a court of law's acquittal and an exoneration of any wrong doing by an administrative hearing.

Question-3: Can the foundation of a "Brady" issue that would effect the credibility as a witness hinge on unsubstantiated accusations that have been adjudicated in a court of law and found to be without merit?

4. Respondents have indicated that the actions of transferring the petitioner to an "administrative" position, the removal of all law-enforcement authority, and the stripping of city benefits was taken, in part, because the petitioner had made arrests once he had been reinstated. These arrests were made both on duty, during the normal performance of his duty, and off duty while engaged in previously approved secondary employment. Respondents have ordered that the petitioner never make an arrest either on duty or off duty as it will result in termination of his employment..

Question-4: Does a police supervisor have the authority to prevent a sworn law enforcement officer from enforcing laws which deal directly with the safety of the public when the officer is justified in law as well as fact in attempting to comply with those statutes?

5. The Petitioner's entire case, including the Complaint, Affidavit, and Brief of Plaintiff were all researched, drafted and filed pro se without any assistance from legal counsel. According to Rule 8(a)(2) of Federal Rules of Civil Procedure, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."

Question-5: Where a challenged complaint is one that has been prepared without the benefit of legal expertise, must it be liberally construed to determine whether it meets the above described test?

6. The elected Commonwealth's Attorney for the City of Newport News, Howard Gwynn, whose office prosecuted the petitioner for the 1995 charges, continues to consider the petitioner to be guilty. Based entirely on his own personal belief, Gwynn instituted a "policy" regarding the Petitioner. Gwynn has publicly stated that his office will not prosecute any case brought by the petitioner because of that belief. Using said "policy" as a guise, the respondents have once again, implemented severe punitive measures against the petitioner.

Question-6: Does a citizen of the United States have a constitutionally protected right to be considered innocent until proven guilty in a court of law?

Question-7: Does the right to hold specific employment and follow a chosen profession free from unreasonable governmental interference, and free from unauthorized actions of government officials which substantially impair property interest, come within the "liberty" and "property" concepts of the Fifth Amendment?

Question-8: Does a citizen of the United States have a constitutionally protected right not to be punished for crimes he did not commit?

Question-9: Is the ruling of the United States District Court, dismissing the petitioner's *pro se* complaint for failure to state a claim, inconsistent with opinions from other United States District Courts and inconsistent with case law from the United States Supreme Court?

Question-10: Is the ruling of the United States Court of Appeals for the Fourth Circuit, Affirming said dismissal, inconsistent with opinions from other United States Appeals Courts and inconsistent with case law from the United States Supreme Court?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

A corporate entity is not a petitioner in this case. There is no parent or publicly held company owning 10% or more of the corporation's stock.

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Diedrich v. City of Newport News, No. 04-1603CA-04-9-4 (Sep. 14, 2004). (Appendix G)

JURISDICTION

The date on which the United States Court of Appeals decided this case was SEPTEMBER 14, 2004. No petition for rehearing was timely filed in this case.

The jurisdiction of this Court is invoked under 28 U. S. C Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

42 United States Code, Section 1983

The Fifth and Fourteenth Amendments to the United States Constitution provide that no person shall be deprived of life, liberty, or property without due process of law; nor shall any person be denied equal protection of the law.

42 United States Code, Section 1985

Conspiracy to interfere with civil rights. If two or more persons in any State or Territory conspire.....for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;...if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

VIRGINIA STATUES

Code of Virginia § 15.2-1506
Establishment of grievance procedure

Code of Virginia § 15.2-1507 (10)(a)(6)
Provision of grievance procedure

Code of Virginia §§ 9.1-500 though 9.1-507
Law-Enforcement Officers Procedural Guarantee Act

Code of Virginia § 15.2-1704
Powers and duties of police force

Code of Virginia § 19.2-392.2
Expungement of police and court records.

STATEMENT OF THE CASE

This case is about a subterfuge. This case is about retaliation and retribution. This case is about punitive and disciplinary actions. This case is about conspiracy to deprive civil rights. This case is about non-compliance with a legally binding decision. This case is about Liberty, Property, Due Process and Equal Protection of Law. This case is about fundamental fairness and justice.

This case is <u>not</u> about a transfer from one assignment to another. This case is not about Diedrich claiming that he has a constitutional right to perform a specific function within the Police Department. This case is not about City Management exercising its right to... "*assign and direct* the work of employees". This case is not about the establishment of "personnel and operating policies, procedures, rules and regulations, to hire, promote, transfer, *assign* and retain employees...". In short, this case is not about a particular assignment, and not about a mere transfer.

The Plaintiff, Jason L. Diedrich has been employed by the City of Newport News Police Department since September 26, 1991. Diedrich was assigned to uniform patrol, as uniform patrol officer on independent patrol, after graduating from the police academy and completing field training.

On April 23, 1995, Diedrich was arrested by the Vice/Narcotics Unit of the Newport News Police Department and charged with grand larceny and perjury. The charges placed against Diedrich were a result of an investigation conducted by the Vice/Narcotics Unit. It was alleged that Diedrich committed grand larceny of $1,000 during the execution of a search warrant in January of 1995, and that Diedrich committed perjury by swearing to false information before a magistrate in obtaining a search warrant on April 23, 1995.

On May 26, 1995, Diedrich was terminated from his employment with the Police Department for the aforesaid charges and charges alleging violations of the City of Newport News' Standards of Conduct. On June 6, 1995, Diedrich filed a grievance (grievance no. 95-24) claiming unjustified termination and denying guilt of any criminal charges or violations of the city's standards of conduct. On August 2, 1995, per an agreement between the respondent and Diedrich, further proceedings in the grievance were postponed until after the court trials on the criminal charges were concluded.

On January 12, 1996, Diedrich was tried before a jury on the perjury charge. The jury, after presentation of all evidence, returned its verdict of "not guilty". On April 23, 1996, Diedrich was tried before a jury on the grand larceny charge. The jury, after presentation of all evidence, returned its verdict of "not guilty". Diedrich was ordered acquitted and discharged of the charges by the court.

On July 16, 1996, a grievance procedure Step IV meeting was held in accordance with Virginia Code §15.2-1507 (8), and Newport News City Code 2-186(5). This meeting was held between Diedrich, his attorney Robert Beale, the Senior Assistant City Attorney Arthur G. Lambiotte, and the City Manager's designated representative Billy Mitchell (Assistant City Manager). In Billy Mitchell's Step IV response to Diedrich, he reversed Diedrich's termination on the grand larceny charge calling it "inconclusive". However, Mitchell upheld Diedrich's termination in reference to the perjury charge. Diedrich requested a panel hearing in accordance with Virginia Code § 15.2-1507 (10) and Newport News City Code 2-186 (b).

On October 2, 1996, a three member panel hearing was convened and heard the evidence in reference to Grievance No. 95-12. During the City's presentation of the evidence, counsel for the City, Arthur G. Lambiotte, presented the panel with a letter from Matthew D. Danielson, Assistant Commonwealth's Attorney for the City of Newport News, who actually prosecuted Diedrich in the perjury and larceny trials. In the letter presented to the panel, Danielson relayed that because that office had prosecuted Diedrich for perjury, Diedrich would not be allowed to take the stand as a witness for the Commonwealth in any case that he may be involved in as a police officer. The letter presented was written on October 1, 1996, the day before the grievance panel hearing, and was drafted with the intent of manipulating the grievance panel's ruling. **(See letter at Appx: A)**

The grievance panel, after hearing all the evidence, ruled completely in favor of Diedrich.

The panel's decision was as follows:

> **The panel finds in favor of Jason L. Diedrich. The panel finds that Jason L. Diedrich did not willfully swear falsely in the affidavit for search warrant signed by Jason L. Diedrich on 23 Apr. 1995, 0135. Jason L. Diedrich should be reinstated as soon as administratively reasonable with back pay.**

Following the panel decision, Diedrich was placed back on the city payroll, and over the next few months was retrained and re-certified as a law enforcement officer. Upon completion of Diedrich's re-training, he was not returned to his former position as uniform patrol officer, but instead ordered to man the information desk, answering telephones and performing clerical work.

Diedrich stringently objected to this change of assignment as punitive, retaliation and retribution. Diedrich's objections were ignored. Diedrich filed Grievance No. 97-12 on February 6, 1997, claiming punitive retaliation as a result of utilization of the grievance procedure.

On March 5, 1997 Diedrich was offered and accepted a settlement agreement by the Chief of Police, Billy Payne. In Payne's Step III response he offered, as relief to Diedrich, an immediate transfer to the Fugitive Apprehension Unit, (which was later changed to be named the Warrant Control Unit). Diedrich accepted this proposal and halted all further proceedings in his grievance.

Diedrich remained employed as a police officer and assigned to the Fugitive Apprehension Unit. Diedrich had full police authority and made countless arrests. Diedrich was used numerous times, since his reinstatement, by the Commonwealth Attorney's Office of Newport News as a Commonwealth's witness. Diedrich's testimony was uncorroborated and resulted in the defendants being convicted. Diedrich testified in over 100 cases in Newport News Traffic Court, and on several occasions in Newport News Criminal Court, Juvenile & Domestic Relations Court and in Newport News Circuit Court. Diedrich demonstrated that his credibility was not an issue and that he could undeniably prepare and give testimony with credibility.

On June 1, 1997, the newly appointed Chief of Police, Dennis A. Mook, (defendant Mook) was appointed to office. In September 1997, Mook began a termination process against Diedrich. The termination was undertaken in part due to the alleged "credibility issues" arising from Diedrich's above described perjury and grand larceny charges, even though Diedrich had been acquitted.

Diedrich retained the services of an attorney and ultimately met with Mook and the City Attorney. After said meeting, Mook ended the termination process and allowed Diedrich to continue as a police officer in the Fugitive Apprehension Unit. Mook wrote in a letter dated September 18, 1997 to Diedrich that he could remain in his current assignment "without further action" and that he considered the matter was closed. **(See letter at Appx: B)**

Due to the continued existence and possible dissemination of the information relating to the past perjury and grand larceny charges, Diedrich feared that circumstances could arise which would constitute a manifest injustice to him. Diedrich therefore Petitioned the Circuit Court of Newport News to have his Record Expunged pursuant to §19.2-392.2, of the Code of Virginia. On June 26, 2002, Newport News Circuit Court Judge Vincent Conway Ordered all police and court records relating to the perjury and grand larceny charges to be expunged. **(See Expungement Order at Appx: C)**

On October 16, 2002, the Chief of Police Dennis Mook, without notice, or justifiable cause, stripped Diedrich of his law enforcement authority and punitively demoted him to "administrative" desk duty as a secretary performing clerical work. Diedrich was ordered to resign all part time employment positions that called for any possible use of law enforcement authority. Diedrich's approved secondary employment consisted of an estimated of $12,000 to $15,000 per year in income. This income has been lost due to the respondent's actions. **(See letter at Appx: D)**

Mook informed Diedrich that the transfer and the stripping of his law enforcement authority was a result of the Commonwealth's Attorney, Howard E. Gwynn (Gwynn) informing the Police Department, in a letter dated May 14,

2002, that Diedrich's commonwealth prosecuted cases would be nolle prossed unless there was independent corroborating evidence to accompany Diedrich's testimony. Gwynn specifically indicated in the May 14, 2002 letter that the policy of nolle prossing Diedrich's cases was a direct result of the 1995 perjury and grand larceny charges. Gwynn stated that in spite of the jury's findings of "not guilty", he [Gwynn] remained convinced of Diedrich's guilt. **(See letter at Appx: E)**

Diedrich was transferred to the Records Division of the Police Department effective October 30, 2002. Diedrich was assigned as the departments **I**ncident **B**ased **R**eporting (IBR) Quality Control. Diedrich was stripped of the tangible benefit of use of a department issued take home police vehicle, and was deprived of the benefit of working any part time employment position, which involved the possible use of law enforcement authority. The secondary employment and take home vehicle programs are offered and advertised by the department as employment benefits. Diedrich was also ordered not to enforce any laws at any time, either on-duty as a law-enforcement officer, or even off-duty as a civilian. Mook informed Diedrich that if he, [Diedrich] did take any law enforcement action on duty or off, even in cases involving robbery, rape, or murder, that he [Diedrich] would be charged with a level 3 misconduct violation and his employment would be terminated.

In September of 2003, the plaintiff had been in the Records Division for a period of ten (10) months. During that time, the petitioner dealt with extreme emotional distress, embarrassment and humiliation. The plaintiff received written orders from the Commander of the Records Division, Lieutenant Michael New, to report to the I&O Medical Clinic, to see the City's contracted medical doctor, Dr. Michael Baddar, for a "fitness for duty" evaluation.

The plaintiff followed this order and reported as instructed to Dr. Baddar at the I&O Medical Clinic. Following a very brief two (2) minute discussion with Dr. Baddar, Diedrich was deemed unfit for duty and ordered suspended without pay. Diedrich was also directed to undergo a psychiatric evaluation with the City's contracted psychiatrist.

The plaintiff was referred to Dr. Christine A. Nogues PSY D, with Behavioral Medicine Institute. Dr. Nogues met and interviewed the plaintiff and administered an "MMPI" test. Approximately two weeks thereafter, the Plaintiff received a telephone call from Dr. Baddar and was informed that he was going to be deemed "unfit for duty", and would be ordered to participate in psychotherapy counseling at his own expense.

The plaintiff was never informed by Dr. Baddar of the reasons or diagnosis used to deem him unfit for duty. In a subsequent meeting with Dr. Nogues, Diedrich was informed that in her evaluation, she deemed Diedrich "unfit" for duty, not based on the results of the MMPI test, but solely based on the fact that Diedrich's working conditions were causing extreme mental and emotional distress which resulted in physical illness.

Dr. Nogues stated that Diedrich was completely fit for the duties of a police officer. However, the embarrassment of being restricted to secretarial duties caused Diedrich to experience severe emotional distress. Defendant Mook ordered Diedrich suspended without pay. The unpaid suspension lasted from October 1, 2003 through January 5, 2004.

Upon returning to duty, the Defendants, with full knowledge of the causes of the emotional distress, returned him to the same assignment with complete disregard for Diedrich.

On February 2, 2004, Plaintiff Jason Diedrich filed his *pro se* suit against Defendants in the United States District Court for the Eastern District of Virginia, Newport News Division.

On February 23, 2004, Defendants Maroney and Mook filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the FEDERAL RULES OF CIVIL PROCEDURE. The City filed its Motion to Dismiss on February 24, 2004, also seeking dismissal pursuant to Rule 12(b)(6). In response, the Plaintiff filed an Answer to Motions to Dismiss, a Sworn Affidavit, Brief of Plaintiff, and a Motion for Preliminary Injunction on March 11, 2004.

On October 26, 2004, the United States District Court for the Eastern District of Virginia, Newport News Division dismissed Diedrich's Complaint under Rule 12(b)(6) of the FEDERAL RULES OF CIVIL PROCEDURE and rendered his Motion for Preliminary Injunction MOOT. **(See Order at Appx: F)**

A timely Appeal was filed to the United States Court of Appeals for the Fourth Circuit. On September 14, 2004 the Fourth Circuit AFFIRMED the Dismissal in an Unpublished "Pur Curiam" Order. **(See Order at Appx: G)**

REASONS FOR GRANTING THE WRIT

A decision of a Grievance panel is final and binding on all parties. *Angle v. Overton*, 235 Va. 103, 365 S.E.2d, 758 (1998). Management is not authorized to use its own discretion in following and obeying a legally binding panel decision. The Defendants in this case have no authority to re-punish Diedrich by demoting, punitively transferring or destructing Diedrich's right to seek, hold and practice his chosen profession of law enforcement. While the Defendants do reserve the right to transfer and assign duties, having referenced the perjury and grand larceny as their *basis* for the

decision to transfer Diedrich to a position with law enforcement restrictions, they are, in effect, using the transfer as an unlawful, alternative disciplinary action that punishes Diedrich for charges he has been acquitted and exonerated. These actions are a substitute whereby the respondents have circumvented the ruling of the grievance panel (which ordered Diedrich's reinstatement "without restriction") by instituting punitive actions based on personal beliefs and not evidence.

Under Newport News City Code, a particular assignment may not be, in and of itself, "grievable". However, when a transfer is specifically and subjectively utilized as a direct punitive and disciplinary action, and an unpaid suspension is imposed, those actions clearly fall under the established grievance process. (9.1-502, Code of Virginia, Law-Enforcement Officer's Procedural Guarantee Act.) Furthermore, Diedrich's reassignment was not an bona fide transfer. Diedrich's relocation was accompanied by the removal of all law-enforcement authority and arrest powers, which amounted to a demotion. A violation of Diedrich's civil rights, and the stripping of tangible financial city benefits. These actions effectively render the jury acquittals, the grievance panel decision, and Virginia Law impotent and powerless.

The ruling of the United States District Court for the Eastern District of Virginia, dismissing the Plaintiff's complaint, and the "PUR CURIAM" affirmation of that ruling by the United States Court of Appeals for the Fourth Circuit is inconsistent with case law from the Supreme Court of the United States as well as rulings by other United States District Courts, and inconsistent with rulings of the Supreme Court of Virginia.

The FEDERAL RULES OF CIVIL PROCEDURE

indicate that a Complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The accepted rule in appraising the sufficiency of the Complaint is that it "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41 45-46 78 S.Ct 99, 101-102 2 L. Ed.2d 80 (1957).

Where the challenged complaint is one that has been prepared without the benefit of legal expertise, as in this case, it must be liberally construed to determine whether it meets this test. *French v. Heyne*, 547 F.2d 994, 996 (7th Cir. 1981. "Pro se Complaints, however unskillfully pleaded, are to be liberally construed." *Vinnedge v. Gibbs*, 550 F.2d 926 (1977). "Pro se pleadings must be held to less stringent standards than those prepared by counsel." *Duncan v. Duckworth*, 644 F.2d 653, 655 (7th Cir. 1981).

The defendants in this case implemented and participated in a covert investigation against Diedrich. That clandestine investigation lasted for over a two year period and included "many-many meetings" between the defendants and the Commonwealth's Attorney and possibly, other non-city employees.

The exclusive purpose for the investigation and the meetings was to plot and formulate a plan to once again terminate Diedrich's law-enforcement career based on the exact same perjury and grand larceny charges of which Diedrich had been vindicated.

That plan of action was implemented by the defendants on October 16, 2002. Diedrich was demoted to an "administrative position" and his career in law-enforcement ended for all intents and purposes. Diedrich's opportunity for advancement, promotion, and transfer was stripped.

This action deprived Diedrich of his implicit due process right and was a subterfuge in which the defendants intended to circumvent the binding grievance panel's decision.

In 1995, Diedrich was terminated from employment because of perjury and grand larceny charges. Diedrich was put on trial and the Justice System found Diedrich to be "not guilty". An Administrative hearing (i.e. the Grievance Procedure), which is guaranteed under Due Process of Law, completely exonerated Diedrich of any wrongdoing. The grievance panel found in favor of Diedrich and in its written decision, ordered his unrestricted reinstatement as a law-enforcement officer. The ruling of a grievance panel is binding on the city. *Angle v. Overton*, 235 Va. 103, 365 S.E.2d, 758 (1998).

The Defendants have punitively transferred Diedrich because of those same perjury and grand larceny charges. The Defendants have demoted Diedrich from his position of a Law-Enforcement Officer to that of a civilian secretary through the removal of all law-enforcement authority based on those same perjury and grand larceny charges. The Defendants have stripped Diedrich of particularly important and monetarily tangible employment benefits because of those same perjury and grand larceny charges.

In taking the above described adverse actions, the Defendants have deprived the Petitioner of a legally binding panel decision. The Defendants have taken the above described actions while depriving Diedrich of any form of Due Process of Law.

The basis for the respondents decision to strip the petitioner of law enforcement authority has rendered the petitioner unemployable in the area of law enforcement for which he received training and was employed. While Diedrich is still employed by the same agency, the

respondents decision to strip him of his law enforcement authority renders Diedrich unemployable within the field of service for which he was hired. The unauthorized stripping of his authority impose on Diedrich a "disability" or stigma of a kind which impair and deprive him of liberty to follow his chosen profession as a law-enforcement officer.

"The right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts of the Fifth Amendment." *Greene v. McElroy*, 360 U.S. 474, 3 L ed 2d, 1377, 79 S.Ct. 1400.

The actions taken against Diedrich in this case were officially adopted and promulgated by officer's of the City of Newport News. Specifically, the Chief of Police Dennis A. Mook, and the City Manager Edgar E. Maroney.

"Local governing bodies...Can be sued directly under 1983 for monetary, declaratory, or injunctive relief where...The action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed2d 611 (1978).

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted

Respectfully submitted,

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APPENDIX

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APPENDIX: A

October 1, 1996

Mr. Arthur Lambiotte
Newport News City Attorney's Office
2400 Washington Avenue
Newport News, Virginia 23607

Re: Jason Diedrich
Dear Mr. Lambiotte:

I am writing in response to our telephone conversation this morning, during which time you advised that there is a grievance hearing scheduled tomorrow regarding Mr. Diedrich. Subsequent to that conversation I telephoned Mr. Gwynn to verify what I had informed you would be the policy of this office should Mr. Diedrich regain his job with the Newport News Police Department.

Because this office prosecuted Mr. Diedrich for perjury, we would not allow Mr. Diedrich to take the stand as a witness for the Commonwealth in any case that he may be involved in as a police officer. Our office cannot vouch for the credibility of someone whom we believe lied under oath on several occasions.

It should also be brought to your attention that Mr. Diedrich has a pending felony charge of maiming which is scheduled to be tried on October 16, 1996 at 10:00 a.m. before the Honorable Judge Randolph T. West.

If I can be of any further assistance, please do not hesitate to contact me.

Sincerely,

/s/ Matthew D. Danielson
Asst. Commonwealth's Attorney
City of Newport News

cc: Howard Gwynn

APPENDIX: B

September 18, 1997

Officer Jason Diedrich
Newport News Police Department
2600 Washington Avenue
Newport News, VA 23607

Dear Officer Diedrich:

This letter is follow-up to our meeting today concerning potential personnel action as a result of your assault and battery conviction. I am pleased we had an opportunity to meet and discuss this situation before any decision was made.

Previously, you had pleaded guilty to assault and battery, a Class 1 misdemeanor under the Code of Virginia. Departmental hiring standards provide for conviction of a Class I or II misdemeanor as an automatic disqualifier for employment in the Newport News Police Department, therefore, the question became one of your ability to continue your employment with this organization. However, during our discussions, you indicated that you had information that other members of the department had similar convictions and their employment was still intact. Subsequent to that conversation we, again, met. Also in attendance was your legal representative, Mr. Robert W. Lawrence, and the legal representative for the police department, Mr. Arthur Lambiotte. Based upon that meeting you later provided me with information pertinent to you situation.

After reviewing all available information, my decision is to allow you to continue your employment with the Newport News Police Department based upon the fact that if terminated, you would have been treated differently from others in similar situations. Being fair minded I cannot justify terminating your employment without going back and

terminating the employment of others who have had similar, but I believe substantially different, events occur in the distant past. In either case, disparate treatment is the issue.

We also discussed your ability, or lack thereof, to testify in the courts of a number of our judges as well as a Commonwealth witness by the Commonwealth's Attorney. Based upon events that transpired before I was appointed to this position, it has been made known to me that your credibility is an issue. Therefore your effectiveness as a police officer is reduced, hence your ability to function in most assignments within this department is severely limited. That is a situation over which neither of us has control.

At this point in time, I see this matter as closed. You may remain in your current position as a member of the Fugitive Apprehension Unit without further action. In my view, our system has worked. Decisions must be made based upon all information available and the decisions must be based upon sound principles.

I wish you the best and my door is open in the event that I may be able to assist you in any way.

Sincerely,

/s/ Dennis A. Mook
Chief of Police

cc: Mr. Art Lambiotte
Mrs. Caroline Hurt

APPENDIX: C

VIRGINIA: In the Circuit Court for the City of Newport News.

Commonwealth of Virginia
Plaintiff,

V Misc. No. 11644 -VC

Jason Leon Diedrich
Defendant/Petitioner.

ORDER

It appearing to the Court that the petitioner has filed in this Court a petition pursuant to Section 19.2-392.2 of the Code of Virginia, 1950, as amended, praying that police and court records relating to charge(s) more particularly set forth therein be expunged and that a copy of any order for expungement be served upon the Department of State Police to be acted upon in accordance with the rules and regulations adopted pursuant to Section 9-190 of the Code of Virginia, 1950, as amended; and

Whereas, it further appearing to the Court that the continued existence and possible dissemination of information relating to the charges(s) against petitioner may cause circumstances which constitute a manifest injustice to said petitioner.

Now, therefore, in consideration of the forgoing it is hereby ADJUDGED, ORDERED and DECREED that all police and court records relating to the charge(s) more particularly set forth and described in the petition filed herein be, and they hereby are expunged; and it is further

ORDERED that the Clerk of this Court forward a copy of this Order of Expungement, together with a copy of the petition filed herein, to the Department of State Police to be acted on in accordance with the rules and regulations

adopted pursuant to Section 9-190 of the Code of Virginia, 1950, as amended.

ENTERED this 26th day of June, 2002

/s/ H. Vincent Conway, Jr.
Judge

I ask for this:

/s/ Jason Leon Diedrich
Petitioner's Signature

Seen:
/s/ Valerie Muth
Attorney for the Commonwealth

APPENDIX: D

October 16, 2002

Detective Jason L. Diedrich
81 Huber Road
Newport News, VA 23601

Dear Detective Diedrich:

The Newport News Police Department has been put on notice by the Newport News Commonwealth's Attorney that his office will not prosecute any criminal case in which your testimony is essential to the prosecution of the case and your testimony is uncorroborated. The Commonwealth's Attorney indicates that in the absence of such a corroborating witness, a criminal case in which you are involved will be nolle processed.

Given the Commonwealth's Attorney's position with respect to calling you as a witness, it is not possible for you to meet the requirements and conditions to fully perform your duties as a police officer in the City of Newport News.

Although your current assignment in the Warrant Control Unit tends to limit your need to bring new criminal charges against individuals, there exists the possibility of required police action to the nature of the position. Additionally, you have chosen over the past several years to exercise your police powers to make arrests while off duty, including several while involved in secondary employment. Your current assignment, therefore, places you in conflict with the Commonwealth's Attorney's policy regarding your suitability as a witness. This situation also raises an issue of you personal safety, since you have acknowledged in your own letter to Mr. Gwynn on May 21, 2001, you may become a target for assaults.

In order not to jeopardize the public safety of this

community or your own personal safety as an employee of this department, I am transferring you as of October 16, 2002, to an administrative position as Quality Control Officer in the Records Division of the Police Department. You will remain a sworn officer, and retain your rights and benefits as such, but I am expressly prohibiting you from engaging in any criminal enforcement activity or initiating an arrest while on duty or off duty. As such, secondary employment will not be approved if it requires use of police powers. Any violation of this directive regarding the exercising of arrest powers will constitute a Level III Misconduct Violation. I bring this to your attention so that there is no misunderstanding about the seriousness of this directive prohibiting your exercise of police powers within Newport News.

This assignment to an administrative position will remain in effect as long as the Commonwealth's Attorney maintains his current position that your credibility as a witness is a serious issue, as outlined in his enclosed letter to me of May 14, 2002. Because of this, please be advised that you will not be considered for transfer to another position in the department involving criminal enforcement as long as the Commonwealth's Attorney's position remains the same.

Sincerely,
/s/ Dennis A. Mook
Chief of Police

DAM/pam
Enclosure

pc: City Manager
City Attorney
Director of Personnel

APPENDIX: E

May 14, 2002

Dennis Mook, Chief
Newport News Police Department
2500 Washington Avenue
Newport News, Virginia 23607

Re: Jason Diedrich

Dear Chief Mook:

As you know, in 1996, this office prosecuted Diedrich for grand larceny and perjury. A tremendous amount of time was spent investigating the charges before they were filed. We were convinced that Diedrich was guilty beyond any reasonable doubt of these very serious charges. In spite of the jury's findings of not guilty, this office remains convinced of Diedrich's guilt.

Consequently, it has been and remains the policy of this office that if Diedrich's testimony is essential to the prosecution by this office of a criminal case and his testimony is uncorroborated, then that case will be nolle prossed. Ethically, we simply cannot rely on the uncorroborated testimony of a witness whose credibility is a serious issue.

Whether or not Diedrich has subsequently obtained convictions in non-Commonwealth cases or even in Commonwealth cases, the above-referenced policy remains unchanged.

Sincerely yours,

/s/ Howard E. Gwynn
Commonwealth's Attorney

HEG/ea

APPENDIX: F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

JASON L DIEDRICH,
PLAINTIFF,

v. CIIVIL ACTION NO.: 4:04CV9

CITY OF NEWPORT NEWS, VIRGINIA,
EDGAR E. MARONEY, AND
DENNIS A. MOOK.
DEFENDANTS.

ORDER

This matter is before the Court on Motions to Dismiss filed by each Defendant for the Plaintiff's alleged failure to state a claim pursuant to Rule 12(b)(6) of the FEDERAL RULES OF CIVIL PROCEDURE (Documents No. 6, 8), and Plaintiff's Motion for Preliminary Injunction (Document No. 12). The Court heard the motions on April 21, 2004. For the reasons stated in this Order, the Court **GRANTS** the Defendants' motions as to Counts One and Two, and declines to exercise jurisdiction over Counts Three and Four, rendering the Plaintiff's Motion for Preliminary Injunction **MOOT**.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY[1]

On February 2, 2004, Plaintiff Jason Diedrich ("Plaintiff")

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[1] The facts of this ruling are stated in the light most favorable to the Plaintiff, and are not factual findings for any purpose other than this decision on the recited motions.

filed suit against the City of Newport News ("the City"), Newport News City Manager Edgar Maroney ("Maroney") and former Newport News Police Chief Dennis Mook ("Mook"), in the United States District Court for the Eastern District of Virginia, Newport News Division. Compl. at 1. The Plaintiff claims that the Defendants deprived him of rights secured by the Constitution and laws of the United States, in violation of 42 U.S.C. § 1983. Compl. at ¶ 1.

The Plaintiff is currently employed as a police officer with the City and has held that position for twelve (12) years. Id. at ¶ 5. In May 1995, the Plaintiff was terminated by the City for allegedly committing grand larceny and perjury, in violation of the City's Standards of Conduct. Id. at ¶ 12. In 1996, the Plaintiff was tried on these charges by two separate juries and found "not guilty." Id. at ¶ 13. The Plaintiff sought reinstatement to the City's Police Department through the City's grievance procedure (Grievance No. 95-24), and was eventually retrained and certified as a law enforcement officer. Id. at ¶ 17. When the Plaintiff returned to the police department, he was assigned to the Records Division rather than his former position of Uniform Patrol Officer. Id. Plaintiff objected to this assignment, and claimed it was a retaliatory transfer. Id. The Plaintiff grieved his assignment to the Records Division (Grievance No. 97-12), and as a result of an agreement with the City (hereinafter, "Settlement Agreement"), was assigned as a Detective in the Fugitive Apprehension Unit (later called the Warrant Control Unit). Id. at ¶ 18. The Plaintiff served in the Fugitive Apprehension Unit from March 1997 until October 2002, with an above-average work performance. Id. at ¶ 20. During this time with the Warrant Control Unit, the Plaintiff supplemented his regular police income by serving in department-approved, secondary off-duty employment positions which called for the use of statutory law enforcement authority and arrest

powers. Id. at ¶ 21.

On October 16, 2002, the Plaintiff was charged with "being unable to meet the requirements and conditions to fully perform the duties as a police officer in the City of Newport News." Id. at ¶ 23. On that date, the Plaintiff was transferred to an "administrative position" in the Records Division. Id. at ¶ 24. The Plaintiff was also ordered not to exercise his police powers, and that he would no longer be allowed to work any secondary, off-duty positions that called for the possible use of arrest authority. Id. The City no longer pays the Plaintiff a clothing allowance since the Plaintiff was transferred to the Records Division. Id. at ¶ 27. The Plaintiff is expected to wear the police department uniform, but not allowed to perform any duties which call for the use of law enforcement authority. Id. at ¶ 28. As a result of his transfer, the Plaintiff now serves parking ticket summons, arrests persons with outstanding arrest warrants, and escorts those individuals to the Magistrate's Office for processing. Id. at ¶ 29. Civilian and other sworn officers have been advised that the Plaintiff has no police authority and told not to request the Plaintiff's assistance in those matters. Id. at ¶ 30. The Plaintiff claims that these circumstances have caused him "extreme emotional distress, embarrassment and humiliation." Id. He also claims that he has been forced to use personal medical leave to manage the hardships of the situation. Id. at ¶ 31.

Following the Plaintiff's transfer to the Records Division, the Plaintiff filed a grievance (Grievance No. 03-10) on November 4, 2002, claiming retaliation, retribution, improper and illegal disciplinary and punitive action. Document No. 11, Diedrich Aff. at ¶ 85. Mook requested a grievability determination on the Plaintiff's grievance, and Maroney determined that the Plaintiff would not be able to pursue his claim through the grievance process. Diedrich

Aff. at ¶¶ 87-88. The Plaintiff appealed Maroney's "non-grievable" determination to the Circuit Court of Newport News, where the Circuit Court ruled the issues "non-grievable." Id. at ¶ 89.

In September 2003, after working in the Records Division for ten (10) months, the Plaintiff was ordered to report to the City's contracted medical doctor, Dr. Michael Baddar, for a "fitness for duty" evaluation. Compl. at ¶ 32. After a five-minute discussion with the Plaintiff, Dr. Baddar deemed him temporarily "unfit for duty" and ordered out of work. Id. at ¶ 33. He was also ordered to undergo a psychiatric evaluation performed by a psychiatrist designated by the City. Id. The Plaintiff was then evaluated by Dr. Christine A. Nogues, after which the Plaintiff learned that he was deemed "unfit for duty" and ordered to undergo psychotherapy counseling at his own expense. Id. at ¶ 34. On October 1, 2003, the Plaintiff was placed on inactive medical leave, without pay, which continued until January 6, 2004. Id. at ¶ 35.

The Plaintiff alleges that the Defendants' "illegal actions have resulted, and will continue to result, in irreparable harm to the plaintiff, including but not limited to further violations of his legal rights." Id. at ¶ 37. The Plaintiff also asserts that he has no clear, adequate, or complete remedy at law to address the wrongs described, and thus seeks injunctive relief restraining Defendants from continuing to engage in the conduct described. Id. at ¶ 38. As a result of the Defendants' actions, the Plaintiff claims that he "has suffered and continues to suffer, emotional distress, embarrassment, humiliation, pain and mental anguish, as well as physical illnesses." Id. at ¶ 40. He also alleges that he "incurred loss of income, was deprived of the benefits of his position, incurred additional expenses including attorney and medical fees, suffered financial hardship, as well as damage to his professional reputation and career." Id.

In Count One, the Plaintiff claims a deprivation of liberty under the Fifth Amendment and Deprivation of Due Process under the Fourteenth Amendment of the United States Constitution. Id. at 11. Specifically, the Plaintiff claims that the Defendants' actions against the Plaintiff "constituted a transfer for punitive reasons, and a demotion," and he was denied his rights to be given written notice, a reasonable amount of time to respond, to be assisted by counsel, to be notified of his right to initiate a grievance under the grievance procedure, and to proceed under the City's grievance procedure. Id. at ¶¶ 44-49. In Count Two, the Plaintiff claims that the Defendants have conspired to interfere with civil rights, in violation of 42 U.S.C. § 1985. Id. at ¶¶ 53-55. In Count Three, the Plaintiff alleges Defendants committed intentional infliction of emotional distress. Id. at ¶¶ 56-62. In Count Four, the Plaintiff alleges negligent infliction of emotional distress. Id. at ¶¶ 63-67.

On February 23, 2004, Defendants Maroney and Mook filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the FEDERAL RULES OF CIVIL PROCEDURE. (Document No. 6). The City filed its Motion to Dismiss on February 24, 2004, also seeking dismissal pursuant to Rule 12(b)(6). In response to Defendants' Motions to Dismiss, the Plaintiff filed an Answer to Motions to Dismiss and Affidavit[2] on March 11, 2004. (Document No. 11). On March 11, 2004, the Plaintiff also filed a Motion for Preliminary Injunction.

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[2] The Plaintiff filed an affidavit in response to the Motions to Dismiss. (Document No. 11). Since the Plaintiff submitted the affidavit, the Court has considered it in making its decision on the present motions. The Court treats the affidavit as a judicial admission, and thus, does not convert Defendants' Motions to Dismiss into Motions for Summary Judgment.

(Document No. 12).

DISCUSSION

I. PLAINTIFF'S § 1983 CLAIMS - NO DEPRIVATION OF LIBERTY OR PROPERTY INTEREST

In Count One of the Complaint, the Plaintiff alleges that the Defendant's actions "constitute a conspiracy to deprive the plaintiff of liberty under the Fifth Amendment, and his right to due process under the Fourteenth Amendment." Compl. at ¶ 43. "In order to claim entitlement to the protections of the due process clause -- either substantive or procedural -- a plaintiff must first show that he has a constitutionally protected 'liberty' or 'property' interest and that he has been 'deprived' of that protected interest by some form of 'state action'" Stone v. Univ. of Maryland Med. Sys. Corp., 855 F.2d 167, 172 (4th Cir. 1988) (citing Bd. of Regents v. Roth, 408 U.S. 564 (1972)).

The concepts of liberty and property interests are distinct. "Liberty interests in an employment context pertain not to the right to continue in a given job but rather to the freedom to seek another." Morrash v. Strobel, 842 F.2d 64, 68 (4th Cir. 1987). The Fourth Circuit has stated that an employee could allege a liberty interest if an "employer's action imposed on the [employee] a disability or stigma of a kind which would impair their future employment prospects." Id. at 69 (citing Roth, 408 U.S. at 573-574). However, when a police officer remains employed, he cannot claim that he has been made unemployable. Johnson v. Morris, 903 F.2d 996,999 (4th Cir. 1990). In Johnson, a corrections officer was investigated for hitting an inmate. Id. at 998. The Virginia Department of Corrections made statements to the press that the corrections officer had been placed on leave during an investigation into

the incident. Id. The Fourth Circuit concluded that the plaintiff in Johnson had not asserted a liberty interest because he remained employed. "[W]hen a police officer is suspended but not discharged he 'cannot complain that he has been made unemployable; he remains employed.'" Johnson, 903 F.2d at 999 (quoting Hershinow v. Bonamarte, 735 F.2d 264, 266 (7th Cir. 1984)).

In the case at bar, the Plaintiff has failed to allege a cognizable liberty interest. Like the plaintiff in Johnson, the Plaintiff remains employed, and thus, cannot complain that he has been made unemployable. Even if the Plaintiff were to contend that his future career opportunities have been adversely affected by his transfer to the Records Division, it would not constitute a liberty interest. "[I]f that were a basis for claiming damages for a deprivation of liberty,...the federal courts would become the grievance machinery for public-sector employees." Id. Thus, the Plaintiff has failed to assert a liberty interest.

The Plaintiff also claims that the Defendants conspired to deprive him of a property interest in violation of due process under the Fourteenth Amendment. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Roth, 408 U.S. at 577. Property interests "are created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Id.

The Fourth Circuit recognizes the importance of an employee's property interest in his employment. Fields v. Durham, 909 F.2d 94,98 (4th Cir. 1990). However, "the constitutionally protected property interest in employment

does not extend to the right to possess and retain a particular job or to perform particular services." Id. (citing Huang v. Board of Governors, 902 F.2d 1134 (4th Cir. 1990); Royster v. Bd. of Trustees, 774 F.2d 618, 621 (4th Cir. 1985)). "The transfer of [employees] from one department to another, without loss of rank or pay, does not implicate any property interest protected by the Due Process Clause." Huang, 902 F.2d at 1142. Moreover, a property interest in the continued expectation of public employment does not include a "protected property interest in continuing to perform his services." Royster, 774 F.2d at 621. "Rather, the property interest is more generally in continued employment, and no deprivation exists so long as the employee received 'payment of the full compensation due under the contract.'" Fields, 909 F.2d at 98 (quoting Royster, 774 F.2d at 621).

The Plaintiff claims several property interests in his pleadings. He alleges in his Complaint that the City's decision to reassign him to the Records Division "constituted a transfer for punitive reasons, and a demotion" without the benefits conferred upon him by the Law Enforcement Officers Procedural Guarantee Act, Va. Code Ann. §§ 9.01-500 - 507. Compl. at ¶ 14. It is also inferred from his Complaint that the Plaintiff objects to the Defendants' termination of his "police powers" and opportunity to work "secondary, off-duty employment that called for the possible use of arrest authority." Compl. at ¶ 24. The Plaintiff argues in his Memo of Opposition that the Defendants revoked his "certification, authority, and arrest powers" guaranteed by Va. Code. Ann. § 15.2-1704. See Mem. of Opp'n at 1704. Lastly, at the hearing on these motions, the Plaintiff argued that the property right at issue in this case is his right to have the Settlement Agreement resulting from Grievance No. 97-12 enforced. That agreement required the Plaintiff to drop his grievance against the City in return to the Plaintiff's

transfer from the Records Division to the Investigation Bureau. Diedrich Aff. at ¶ 32.

The Plaintiff fails to state a cognizable property right in the case at bar. The Plaintiff's claim that his transfer to the Records Division and resulting termination of "police powers," including arrest powers and the opportunity to perform off-duty employment, fails for several reasons. First, Section 2-183 of the Newport News City Code states that "[m]anagement reserves the exclusive right to . . . *assign and direct* the work of employees" and "to establish personnel and operating policies, procedures, rules and regulations, to hire, promote, transfer, *assign* and retain employees. . . ." (emphasis added). Moreover, the "hiring, promotion, transfer, assignment and retention of employees by the City is not grievable." Id. In light of this policy, the Plaintiff does not have a "legitimate claim of entitlement" to a particular departmental assignment or accompanying benefits. See Roth, 408 U.S. at 577. Second, the Fourth Circuit has clearly held that an employee's property interest in his employment does not extend to retaining a particular position or performing particular services. Fields, 909 F.2d at 98. So long as the employee continues to receive his full compensation under the contracts, there is no denial of a property right. Id. The Plaintiff's allegations deal only with his transfer to another division and his resulting loss of job perquisites, not an alleged decrease in pay. Lastly, the Plaintiff cannot assert a property interest in off-duty or secondary employment. See Cylbulski v. Cooper, 891 F. Supp. 68, 70 (D. Conn. 1995) (plaintiff has no property interest in "moonlighting" because secondary employment is governed by departmental policy, not a contract).

Plaintiff's assertion that he holds a property interest in the enforcement of the Settlement Agreement made in 1997 transferring him to the Investigation Bureau also fails. The

Plaintiff likens his situation to the one in Zicca v. City of Hampton, 397 S.E.2d 882 (Va. 1990). In Zicca, the plaintiff, a golf course superintendent, was terminated for insubordination. Id. at 882. The plaintiff grieved his firing, and the grievance panel decided that the plaintiff should be returned to his former position as golf course superintendent less thirty (30) days pay. Id. at 882-883. The City of Hampton allowed the plaintiff to return to work as a superintendent for one (1) day, and then transferred him to the City Aerospace Park to perform clerical duties. Id. at 883. The Virginia Supreme Court rejected Hampton's "reinstatement and reassignment" plan, and required the City to return the plaintiff to his position as Golf Course Superintendent. Id. at 471. The case at bar is easily distinguishable from Zicca. In the case at bar, the Plaintiff was transferred to the Investigation Bureau pursuant to the Settlement Agreement, and remained in that position for more than five (5) years before being transferred to the Records Department. Compl. at ¶ 20. The Plaintiff's transfer was not an attempt to minimally comply with the settlement agreement and then circumvent the settlement agreement by transferring the Plaintiff. Moreover, the Plaintiff attempted to grieve his 2002 transfer from the Investigation Bureau to the Records Division, but Maroney decided that the transfer was non-grievable, and that decision was upheld by the Circuit Court of Newport News. Diedrich Aff. at ¶¶ 88-89. Lastly, the Plaintiff conceded that he does not have a vested right to remain in the Warrants Control Unit indefinitely. See Pl.'s Mot. in Opp'n at 9. Accordingly, the Plaintiff cannot show that he has a property right in the 1997 settlement agreement.

The Plaintiff has failed to allege a cognizable liberty or property interest, and thus, fails to state a claim in Count One for deprivation of liberty under the Fifth Amendment or his

right to due process under the Fourteenth Amendment. See Stone, 855 F.2d at 172. Accordingly, the Court **GRANTS** the Defendants' Motions to Dismiss Count One.

II. PLAINTIFF'S § 1985 CONSPIRACY CLAIM - PLAINTIFF IS NOT A FEDERAL OFFICER

In Count Two of the Complaint, the Plaintiff claims that the Defendants conspired to interfere with his civil rights in violation of 42 U.S.C. § 1985. Specifically, the Plaintiff alleges that the Defendants "conspired together to prevent the plaintiff, by force, intimidation, and threat, from discharging the duties of his office." Compl. at ¶ 54. In his Complaint, the Plaintiff attempts to state a claim under § 1985(1), Preventing officer from performing duties. 42 U.S.C. § 1985(1). This claim may only be asserted by officers of the United States. See 42 U.S.C. § 1985(1) ("If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States…; or to induce by like means any officer of the United States…); see also Kush v. Rutledge, 460 U.S. 719, 724 (1983); Wisdom v. Dep't of Hous. & Urban Dev., 713 F.2d 422, 425 (8th Cir. 1983) ("Section 1985(1) prohibits conspiracy to prevent a federal officer from performing his duty."); Morast v. Lance, 807 F.2d 926, (11th Cir. 1987) ("The purpose of this section is to proscribe conspiracies that interfere with the performance of official duties by federal officers."); Shooting Point L.L.C. v. Cumming, 238 F. Supp.2d 729, 739 (E.D. Va. 2002) ("Section 1985(1) prohibits interference with federal officials in the performance of their duties.").

In the case at bar, the Plaintiff is not a federal officer. He conceded that he cannot avail himself of this cause of action. See Pl.'s Mot. in Opp'n at 16. Accordingly, the Plaintiff

fails to state a claim under 42 U.S.C. § 1985 in Count Two, and the Court **GRANTS** the Defendants' Motions to Dismiss as to Count Two.

III. PLAINTIFF'S REMAINING STATE LAW CLAIMS

In light of the Court's granting of Defendants' Motions to Dismiss as to Counts One and Two, only Plaintiff's state law claims of intentional infliction of emotional distress (Count Three) and negligent infliction of emotional distress (Count Four) remain. The court declines to exercise jurisdiction over Counts Three and Four. The Plaintiff may take such action as he feels necessary to pursue these claims in other proceedings.

IV. PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

In light of the Court's dismissal of Counts One and Two, and its decision not to exercise jurisdiction over Counts Three and Four, the Plaintiff's Motion for Preliminary Injunction is **MOOT**.

CONCLUSION

For the reasons stated in this Order, the Court **GRANTS** the Defendants' Motions to Dismiss Counts One and Two. The Court declines to exercise jurisdiction over the Plaintiff's state law claims (Counts Three and Four). The Plaintiff's Motion for Preliminary Injunction is **MOOT**. This Order constitutes the judgment in this case.

The Clerk is **REQUESTED** to send a copy of this order to all counsel of record.

It is so **ORDERED**.

/S/
HENRY COKE MORGAN, JR.
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
April 26, 2004

APPENDIX: G

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-1603

JASON L. DIEDRICH,

Plaintiff - Appellant,

versus

CITY OF NEWPORT NEWS, VIRGINIA; EDGAR E. MARONEY, individually and as City Manager of the City of Newport News; DENNIS A. MOOK, individually and as Chief of Police, Newport News Police Department,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News
Henry Coke Morgan, Jr., Senior District Judge. (CA-04-9-4)

Submitted: September 9, 2004 Decided:
September 14, 2004

Before WILKINSON, MICHAEL, and GREGORY, Circuit Judges.

Affirmed by unpublished Per Curiam opinion

Jason L. Diedrich, Appellant Pro Se. Allen Link Jackson, Deputy City Attorney, Newport News, Virginia; Stanley Graves Barr, Jr., Shepherd Dean Wainger, KAUFMAN & CANOLES, Norfolk, Virginia; for
Appellees.

Unpublished opinions are not binding precedent in this circuit.
See Local Rule 36(c).
PER CURIAM:
Jason L. Diedrich appeals the district court's order denying relief on his 42 U.S.C. § 1983 (2000) complaint. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. See Diedrich v. City of Newport News, No. CA-04-9-4 (E.D. Va. Apr. 26,2004). Diedrich's motion for a stay of the appeal is denied. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

JUDGMENT FILED: September 14, 2004 UNITED STATES COURT OF APPEALS for the Fourth Circuit NO. 04-1603CA-04-9-4

JASON L. DIEDRICH
Plaintiff - Appellant
v.
CITY OF NEWPORT NEWS, VIRGINIA; EDGAR E. MARONEY, individually and as City Manager of the City of Newport News; DENNIS A. MOOK, individually and as Chief of Police, Newport News Police Department
Defendants - Appellees

Appeal from the United States District Court for the Eastern District of Virginia at Newport News

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In accordance with the written opinion of this Court filed this

day, the Court affirms the judgment of the District Court. A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor

_____

CLERK

No. 04-771

Supreme Court, U.S.
FILED
JAN 6 - 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

JASON L. DIEDRICH,

Petitioner,

v.

CITY OF NEWPORT NEWS, VIRGINIA; EDGAR E. MARONEY, individually and as City Manager of the City of Newport News; DENNIS A. MOOK, individually and as Chief of Police, Newport News Police Department,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Rule 15.2 provides in part that "[a]ny objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition." This Court ordinarily does "not decide in the first instance issues not decided below." Nat'l Coll. Athletic Ass'n v. Smith, 525 U.S. 459, 470 (1999). Accordingly, the Respondents note that Questions 2, 3, 4, 6 and 8 were not presented to the District Court.

STATEMENT OF THE CASE

Rule 15.2 provides in part that,

> [i]n addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition.

Accordingly, the Respondents note that the documents attached to the Petition as Appendices A through E are not a part of the record of the proceeding before the District Court or the Court of Appeals.

Moreover, the Petition omits from the Statement of the Case that Mr. Diedrich challenged the City's allegedly punitive transfer through state court proceedings, which were decided adversely to him, as pointed out in the District Court's opinion. See Pet. for Writ of Cert., App. F at 10. Specifically, the state court held that as a matter of state law Mr. Diedrich could not challenge the City's decision to assign him to different duties.

ARGUMENT

State law determines whether a person possesses a property interest subject to the protections of the Fourteenth Amendment. The Fourth Circuit has held consistently that a government employee who has a protected interest in continued employment does not have a protected interest in a particular assignment. Fields v. Durham, 909 F.2d 94, 98 (4th Cir. 1990), cert. denied, 498 U.S. 1068 (1991); Huang v. Bd. of Governors of Univ. of North Carolina, 902 F.2d 1134, 1141-1142 (4th Cir. 1990); Royster v. Board of Trustees, 774 F.2d 618, 620-621 (4th Cir.1985). The Petition identifies no authority holding to the contrary.

Instead, the Petition relies upon a decision of the Virginia Supreme Court in which a terminated local government employee who was returned to work by the decision of a grievance panel received an assignment to lesser work than his prior employment one day after his return to duty. See generally Zicca v. City of Hampton, 240 Va. 468, 397 S.E.2d 882 (1990). The District Court properly distinguished Mr. Diedrich's case, noting that the City returned Mr. Diedrich to a position comparable to the one he had previously held, and left him so assigned for five years. See Pet. for Writ of Cert., App. F at 10.

The District Court also properly disposed of Mr. Diedrich's liberty interest claim, noting that Mr. Diedrich continued to be employed by the City in the position of police officer, albeit in an assignment which he dislikes. Pet. for Writ of Cert., App. F at 6-7, relying on Morrash v. Strobel, 842 F.2d 64, 68-69 (4th Cir. 1987).

Finally, the District Court and the Fourth Circuit held that Mr. Diedrich had failed to identify a property interest or liberty interest protected by the Fourteenth Amendment. The Petition fails to identify any decisions of this Court or of other courts that conflict with that decision so as to support Questions 9 and 10.

CONCLUSION

The Complaint in this matter failed to state a claim upon which relief can be granted. The District Court and the Fourth Circuit Court of Appeals properly so held, for reasons stated here and in the opinion of the District Court, which was adopted by the appellate court. This Court should refuse to grant Mr. Diedrich a writ to review those decisions.

Respectfully submitted,

CITY OF NEWPORT NEWS,
EDGAR E. MARONEY, and
DENNIS A. MOOK

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